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27
28 UNITED STATES DISTRICT COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA
19
20 SAN JOSE DIVISION

21 LEHMAN BROTHERS HOLDINGS,
22 INC.,

23 Plaintiff,
24 v.

25 FIRST FINANCIAL LENDER aka
26 FIRST FINANCIAL CAPITAL

27 Defendant.

28 CASE NO.: C09-00545 PVT

**STIPULATED PROTECTIVE
ORDER**

1 **1. PURPOSES AND LIMITATIONS**

2 Disclosure and discovery activity in this action are likely to involve production
3 of confidential, proprietary, or private information for which special protection from
4 public disclosure and from use for any purpose other than prosecuting this litigation
5 would be warranted. Accordingly, the parties hereby stipulate to and petition the
6 court to enter the following Stipulated Protective Order. The parties acknowledge
7 that this Order does not confer blanket protections on all disclosures or responses to
8 discovery and that the protection it affords extends only to the limited information or
9 items that are entitled under the applicable legal principles to treatment as
10 confidential.

11 The parties further acknowledge, as set forth in Section 10, below, that this
12 Stipulated Protective Order creates no entitlement to file confidential information
13 under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and
14 reflects the standards that will be applied when a party seeks permission from the
15 court to file material under seal.

16 **2. DEFINITIONS**

17 2.1. **Party:** any party to this action, including all of its officers, directors,
18 employees, consultants, retained experts, and outside counsel (and their support
19 staff).

20 2.2. **Disclosure or Discovery Material:** all items or information, regardless of
21 the medium or manner generated, stored, or maintained (including, among other
22 things, testimony, transcripts, or tangible things) that are produced or generated in
23 disclosures or responses to discovery in this matter.

24 2.3. **“Confidential” Information or Items:** information (regardless of how
25 generated, stored or maintained) or tangible things that qualify for protection under
26 standards developed under F.R.Civ.P. 26(c).

27 2.4. **“Highly Confidential – Attorneys’ Eyes Only” Information or Items:**
28 extremely sensitive “Confidential Information or Items” whose disclosure to another

1 Party or nonparty would create a substantial risk of serious injury that could not be
2 avoided by less restrictive
3 means.

4 2.5. Receiving Party: a Party that receives Disclosure or Discovery Material
5 from a Producing Party.

6 2.6. Producing Party: a Party or non-party that produces Disclosure or
7 Discovery Material in this action.

8 2.7. Designating Party: a Party or non-party that designates information or
9 items that it produces in disclosures or in responses to discovery as "Confidential" or
10 "Highly Confidential — Attorneys' Eyes Only."

11 2.8. Protected Material: any Disclosure or Discovery Material that is
12 designated as "Confidential" or as "Highly Confidential — Attorneys' Eyes Only."

13 2.9. Outside Counsel: attorneys who are not employees of a Party but who are
14 retained to represent or advise a Party in this action.

15 2.10. House Counsel: attorneys who are employees of a Party.

16 2.11. Counsel (without qualifier): Outside Counsel and House Counsel (as
17 well as their support staffs).

18 2.12. Expert: a person with specialized knowledge or experience in a matter
19 pertinent to the litigation who has been retained by a Party or its counsel to serve as
20 an expert witness or as a consultant in this action and who is not a past or a current
21 employee of a Party or of a competitor of a Party's and who, at the time of retention,
22 is not anticipated to become an employee of a Party or a competitor of a Party's.
23 This definition includes a professional jury or trial consultant retained in connection
24 with this litigation.

25 2.13. Professional Vendors: persons or entities that provide litigation support
26 services (e.g., photocopying; videotaping; translating; preparing exhibits or
27 demonstrations;

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1 organizing, storing, retrieving data in any form or medium; etc.) and their employees
2 and subcontractors.

3 **3. SCOPE**

4 The protections conferred by this Stipulation and Order cover not only
5 Protected Material (as defined above), but also any information copied or extracted
6 therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus
7 testimony, conversations, or presentations by parties or counsel to or in court or in
8 other settings that might reveal Protected Material.

9 **4. DURATION**

10 Even after the termination of this litigation, the confidentiality obligations
11 imposed by this Order shall remain in effect until a Designating Party agrees
12 otherwise in writing or a court order otherwise directs.

13 **5. DESIGNATING PROTECTED MATERIAL**

14 **5.1. Exercise of Restraint and Care in Designating Material for Protection.**
15 Each Party or non-party that designates information or items for protection under this
16 Order must take care to limit any such designation to specific material that qualifies
17 under the appropriate standards. A Designating Party must take care to designate for
18 protection only those parts of material, documents, items, or oral or written
19 communications that qualify – so that other portions of the material, documents,
20 items, or communications for which protection is not warranted are not swept
21 unjustifiably within the ambit of this Order. Mass, indiscriminate, or routinized
22 designations are prohibited. Designations that are shown to be clearly unjustified, or
23 that have been made for an improper purpose (e.g., to unnecessarily encumber or
24 retard the case development process, or to impose unnecessary expenses and burdens
25 on other parties), expose the Designating Party to sanctions. If it comes to a Party's
26 or a non-party's attention that information or items that it designated for protection
27 do not qualify for protection at all, or do not qualify for the level of protection
28

1 initially asserted, that Party or non-party must promptly notify all other parties that it
2 is withdrawing the mistaken designation.

3 5.2. Manner and Timing of Designations. Except as otherwise provided in
4 this Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise
5 stipulated or ordered, material that qualifies for protection under this Order must be
6 clearly so designated before the material is disclosed or produced. Designation in
7 conformity with this Order requires: (a) for information in documentary form (apart
8 from transcripts of depositions or other pretrial or trial proceedings), that the
9 Producing Party affix the legend “CONFIDENTIAL” or “HIGHLY
10 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” at the top of each page that
11 contains protected material. If only a portion or portions of the material on a page
12 qualifies for protection, the Producing Party also must clearly identify the protected
13 portion(s) (e.g., by making appropriate markings in the margins) and must specify,
14 for each portion, the level of protection being asserted (either “CONFIDENTIAL” or
15 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”). A Party or non-
16 party that makes original documents or materials available for inspection need not
17 designate them for protection until after the inspecting Party has indicated which
18 material it would like copied and produced. During the inspection and before the
19 designation, all of the material made available for inspection shall be deemed
20 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the inspecting
21 Party has identified the documents it wants copied and produced, the Producing Party
22 must determine which documents, or portions thereof, qualify for protection under
23 this Order, then, before producing the specified documents, the Producing Party must
24 affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
25 ATTORNEYS’ EYES ONLY”) at the top of each page that contains Protected
26 Material. If only a portion or portions of the material on a page qualifies for
27 protection, the Producing Party also must clearly identify the protected portion(s)
28 (e.g., by making appropriate markings in the margins) and must specify, for each

1 portion, the level of protection being asserted (either "CONFIDENTIAL" or
2 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"); (b) for testimony
3 given in deposition or in other pretrial or trial proceedings, that the Party or non-party
4 offering or sponsoring the testimony identify on the record, before the close of the
5 deposition, hearing, or other proceeding, all protected testimony, and further specify
6 any portions of the testimony that qualify as "HIGHLY CONFIDENTIAL –
7 ATTORNEYS' EYES ONLY." When it is impractical to identify separately each
8 portion of testimony that is entitled to protection, and when it appears that substantial
9 portions of the testimony may qualify for protection, the Party or non-party that
10 sponsors, offers, or gives the testimony may invoke on the record (before the
11 deposition or proceeding is concluded) a right to have up to 20 days to identify the
12 specific portions of the testimony as to which protection is sought and to specify the
13 level of protection being asserted ("CONFIDENTIAL" or "HIGHLY
14 CONFIDENTIAL – ATTORNEYS' EYES ONLY"). Only those portions of the
15 testimony that are appropriately designated for protection within the 20 days shall be
16 covered by the provisions of this Stipulated Protective Order. Transcript pages
17 containing Protected Material must be separately bound by the court reporter, who
18 must affix to the top of each such page the legend "CONFIDENTIAL" or "HIGHLY
19 CONFIDENTIAL – ATTORNEYS' EYES ONLY," as instructed by the Party or
20 nonparty offering or sponsoring the witness or presenting the testimony; (c) for
21 information produced in some form other than documentary, and for any other
22 tangible items, that the Producing Party affix in a prominent place on the exterior of
23 the container or containers in which the information or item is stored the legend
24 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
25 ONLY." If only portions of the information or item warrant protection, the Producing
26 Party, to the extent practicable, shall identify the protected portions, specifying
27 whether they qualify as "Confidential" or as "Highly Confidential – Attorneys' Eyes
28 Only."

1 5.3. Inadvertent Failures to Designate. If timely corrected, an inadvertent
2 failure to designate qualified information or items as “Confidential” or “Highly
3 Confidential – Attorneys’ Eyes Only” does not, standing alone, waive the
4 Designating Party’s right to secure protection under this Order for such material. If
5 material is appropriately designated as “Confidential” or “Highly Confidential –
6 Attorneys’ Eyes Only” after the material was initially produced, the Receiving Party,
7 on timely notification of the designation, must make reasonable efforts to assure that
8 the material is treated in accordance with the provisions of this Order.

9 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

10 6.1. Timing of Challenges. Unless a prompt challenge to a Designating
11 Party’s confidentiality designation is necessary to avoid foreseeable substantial
12 unfairness, unnecessary economic burdens, or a later significant disruption or delay
13 of the litigation, a Party does not waive its right to challenge a confidentiality
14 designation by electing not to mount a challenge promptly after the original
15 designation is disclosed.

16 6.2. Meet and Confer. A Party that elects to initiate a challenge to a
17 Designating Party’s confidentiality designation must do so in good faith and must
18 begin the process by conferring directly (in voice to voice dialogue; other forms of
19 communication are not sufficient) with counsel for the Designating Party. In
20 conferring, the challenging Party must explain the basis for its belief that the
21 confidentiality designation was not proper and must give the Designating Party an
22 opportunity to review the designated material, to reconsider the circumstances, and, if
23 no change in designation is offered, to explain the basis for the chosen designation. A
24 challenging Party may proceed to the next stage of the challenge process only if it has
25 engaged in this meet and confer process first.

26 6.3. Judicial Intervention. A Party that elects to press a challenge to a
27 confidentiality designation after considering the justification offered by the
28 Designating Party may file and serve a motion under Civil Local Rule 7 (and in

1 compliance with Civil Local Rule 79-5, if applicable) that identifies the challenged
2 material and sets forth in detail the basis for the challenge. Each such motion must
3 be accompanied by a competent declaration that affirms that the movant has
4 complied with the meet and confer requirements imposed in the preceding paragraph
5 and that sets forth with specificity the justification for the confidentiality designation
6 that was given by the Designating Party in the meet and confer dialogue. The burden
7 of persuasion in any such challenge proceeding shall be on the Designating Party.
8 Until the court rules on the challenge, all parties shall continue to afford the material
9 in question the level of protection to which it is entitled under the Producing Party's
10 designation.

11 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

12 7.1. Basic Principles. A Receiving Party may use Protected Material that is
13 disclosed or produced by another Party or by a non-party in connection with this case
14 only for prosecuting, defending, or attempting to settle this litigation. Such Protected
15 Material may be disclosed only to the categories of persons and under the conditions
16 described in this Order. When the litigation has been terminated, a Receiving Party
17 must comply with the provisions of section 11, below (FINAL DISPOSITION).
18 Protected Material must be stored and maintained by a Receiving Party at a location
19 and in a secure manner that ensures that access is limited to the persons authorized
20 under this Order.

21 7.2. Disclosure of "CONFIDENTIAL" Information or Items. Unless
22 otherwise ordered by the court or permitted in writing by the Designating Party, a
23 Receiving Party may disclose any information or item designated CONFIDENTIAL
24 only to: (a) the Receiving Party's Outside Counsel of record in this action, as well as
25 employees of said Counsel to whom it is reasonably necessary to disclose the
26 information for this litigation and who have signed the "Agreement to Be Bound by
27 Protective Order" that is attached hereto as Exhibit A; (b) the officers, directors, and
28 employees (including House Counsel) of the Receiving Party to whom disclosure is

1 reasonably necessary for this litigation and who have signed the "Agreement to Be
2 Bound by Protective Order" (Exhibit A); (c) experts (as defined in this Order) of the
3 Receiving Party to whom disclosure is reasonably necessary for this litigation and
4 who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);
5 (d) the Court and its personnel; (e) court reporters, their staffs, and professional
6 vendors to whom disclosure is reasonably necessary for this litigation and who have
7 signed the "Agreement to Be Bound by Protective Order" (Exhibit A); (f) during
8 their depositions, witnesses in the action to whom disclosure is reasonably necessary
9 and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A).
10 Pages of transcribed deposition testimony or exhibits to depositions that reveal
11 Protected Material must be separately bound by the court reporter and may not be
12 disclosed to anyone except as permitted under this Stipulated Protective Order;
13 (g) the author of the document or the original source of the information.

14 7.3. Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
15 ONLY" Information or Items. Unless otherwise ordered by the court or permitted in
16 writing by the Designating Party, a Receiving Party may disclose any information or
17 item designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" only
18 to: (a) the Receiving Party's Outside Counsel of record in this action, as well as
19 employees of said Counsel to whom it is reasonably necessary to disclose the
20 information for this litigation and who have signed the "Agreement to Be Bound by
21 Protective Order" that is attached hereto as Exhibit A; (B) Experts (as defined in this
22 Order) (1) to whom disclosure is reasonably necessary for this litigation, AND (2)
23 who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);
24 (d) the Court and its personnel; (e) court reporters, their staffs, and professional
25 vendors to whom disclosure is reasonably necessary for this litigation and who have
26 signed the "Agreement to Be Bound by Protective Order" (Exhibit A); and (f) the
27 author of the document or the original source of the information.

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1 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED**
 2 **PRODUCED IN OTHER LITIGATION.**

3 If a Receiving Party is served with a subpoena or an order issued in other
 4 litigation that would compel disclosure of any information or items designated in this
 5 action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
 6 EYES ONLY,” the Receiving Party must so notify the Designating Party, in writing
 7 (by fax, if possible) immediately and in no event more than three court days after
 8 receiving the subpoena or order. Such notification must include a copy of the
 9 subpoena or court order. The Receiving Party also must immediately inform in
 10 writing the Party who caused the subpoena or order to issue in the other litigation that
 11 some or all the material covered by the subpoena or order is the subject of this
 12 Protective Order. In addition, the Receiving Party must deliver a copy of this
 13 Stipulated Protective Order promptly to the Party in the other action that caused the
 14 subpoena or order to issue.

15 The purpose of imposing these duties is to alert the interested parties to the
 16 existence of this Protective Order and to afford the Designating Party in this case an
 17 opportunity to try to protect its confidentiality interests in the court from which the
 18 subpoena or order issued. The Designating Party shall bear the burdens and the
 19 expenses of seeking protection in that court of its confidential material – and nothing
 20 in these provisions should be construed as authorizing or encouraging a Receiving
 21 Party in this action to disobey a lawful directive from another court.

22 **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

23 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
 24 Protected Material to any person or in any circumstance not authorized under this
 25 Stipulated Protective Order, the Receiving Party must immediately (a) notify in
 26 writing the Designating Party of the unauthorized disclosures, (b) use its best efforts
 27 to retrieve all copies of the Protected Material, (c) inform the person or persons to
 28 whom unauthorized disclosures were made of all the terms of this Order, and

1 (d) request such person or persons to execute the "Acknowledgment and Agreement
2 to Be Bound" that is attached hereto as Exhibit A.

3 **10. FILING PROTECTED MATERIAL**

4 Without written permission from the Designating Party or a court order
5 secured after appropriate notice to all interested persons, a Party may not file in the
6 public record in this action any Protected Material. A Party that seeks to file under
7 seal any Protected Material must comply with Civil Local Rule 79-5.

8 **11. FINAL DISPOSITION**

9 Unless otherwise ordered or agreed in writing by the Producing
10 Party, within sixty days after the final termination of this action, each Receiving
11 Party must return all Protected Material to the Producing Party. As used in this
12 subdivision, "all Protected Material" includes all copies, abstracts, compilations,
13 summaries or any other form of reproducing or capturing any of the Protected
14 Material. With permission in writing from the Designating Party, the Receiving Party
15 may destroy some or all of the Protected Material instead of returning it. Whether
16 the Protected Material is returned or destroyed, the Receiving Party must submit a
17 written certification to the Producing Party (and, if not the same person or entity, to
18 the Designating Party) by the sixty day deadline that identifies (by category, where
19 appropriate) all the Protected Material that was returned or destroyed and that affirms
20 that the Receiving Party has not retained any copies, abstracts, compilations,
21 summaries or other forms of reproducing or capturing any of the Protected Material.
22 Notwithstanding this provision, Counsel are entitled to retain an archival copy of all
23 pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney
24 work product, even if such materials contain Protected Material. Any such archival
25 copies that contain or constitute Protected Material remain subject to this Protective
26 Order as set forth in Section 4 (DURATION), above.

12. MISCELLANEOUS

12.1. Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

4 12.2. Right to Assert Other Objections. By stipulating to the entry of this
5 Protective Order no Party waives any right it otherwise would have to object to
6 disclosing or producing any information or item on any ground not addressed in this
7 Stipulated Protective Order. Similarly, no Party waives any right to object on any
8 ground to use in evidence of any of the material covered by this Protective Order.

10 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

12 DATED: August 17, 2009 REILLY POZNER LLP

MICHAEL A. ROLLIN
DANIEL M. REILLY
MATTHEW D. SPOHN
LINDSAY A. UNRUH

Attorneys for Lehman Brothers Holdings, Inc.

and

19 DATED: August 17, 2009

PAUL BICK NGUYEN

Answers for First Finance

Attorney for First Financial Lender

1 PURSUANT TO STIPULATION, IT IS SO ORDERED.
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5 DATED: 8/25, 2009
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Honorable Patricia V. Trumbull
United States Magistrate Judge

Patricia V. Trumbull

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3

4 I, _____ [print or type full name], of _____ [print or type full

5 address], declare under penalty of perjury that I have read in its entirety and

6 understand the Stipulated Protective Order that was issued by the United States

7 District Court for the Northern District of California on _____ in the case of

8 *Lehman Brothers Holdings, Inc. v. First Financial Lender aka First Financial*

9 *Capital*, Case No. C09-00545 PVT. I agree to comply with and to be bound by all the

10 terms of this Stipulated Protective Order and I understand and acknowledge that

11 failure to so comply could expose me to sanctions and punishment in the nature of

12 contempt. I solemnly promise that I will not disclose in any manner any information

13 or item that is subject to this Protective Order to any person or entity except in strict

14 compliance with the provisions of this Order. I further agree to submit to the

15 jurisdiction of the United States District Court for the Northern District of California

16 for the purpose of enforcing the terms of this Protective Order, even

17 if such enforcement proceedings occur after termination of this action.

18 I hereby appoint _____ [print or type full name] of _____ [print or type full address and

19 telephone number] as my California agent for service of process in connection with

20 this action or any proceedings related to enforcement of this Protective Order.

21 Date: _____

22 City and State where sworn and signed: _____

23 Printed name: _____

24 Signature: _____